A

ANTARA STEEL MILLS SDN BHD

v.

CIMB INSURANCE BROKERS SDN BHD

B

HIGH COURT MALAYA, KUALA LUMPUR
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: S22-696-2009]
28 JANUARY 2014

C ***INSURANCE:*** *Insurance broker - Liability under policy - Breach of duty - Error in placement of insurance policy - Whether insurance broker exercised reasonable care and skill in obtaining insurance in accordance with instructions of principle - Whether principal under duty to examine documents - Whether insurance broker negligent*

D ***TORT:*** *Negligence - Duty of care - Breach of duty - Error in placement of insurance policy by insurance broker - Whether insurance broker exercised reasonable care and skill in obtaining insurance in accordance with instructions of principle - Whether principal under duty to examine documents - Whether insurance broker negligent*

E ***ARBITRATION:*** *Agreement - Effect of - Agreement that decision of arbitral tribunal shall be final, binding and non-appealable - Whether parties bound by decision - Whether parties precluded from challenging correctness of decision - Arbitration Act 2005 ss. 37 & 42*

F The plaintiff purchased through the defendant, an insurance broker, an Industrial All Risks Insurance Policy for the period from 1 January 2005 to 31 December 2005 ('2005 IAR Policy') from Progressive Insurance Bhd ('the insurers'). The plaintiff had G instructed the defendant to procure insurance coverage, *inter alia*, for 10 items that were part of its Specified Working Expenses ('SWE items'). Subsequently, there was an explosion in the plaintiff's plant resulting in a claim by the plaintiff based on the policy. However, the insurers denied liability and the parties H resorted to arbitration in accordance with the arbitration clause in the 2005 IAR policy. In the course of the arbitration proceedings, upon discovery that the SWE items were not covered in the 2005 IAR Policy, the plaintiff sought rectification of the 2005 IAR Policy to include the SWE items. The arbitral tribunal disallowed the I plaintiff's claim in relation to the SWE items and also refused its prayer for a rectification of the policy. The plaintiff, therefore,

instituted an action against the defendant for breach of contract and/or breach of duty in the placement of an insurance policy. The error in the placement slip submitted by the defendant to the insurers resulted in the SWE items being excluded from the policy. On the other hand, the defendant contended that the defendant was not liable for the losses suffered by the plaintiff as there was a break in the chain of causation and the plaintiff was guilty of contributory negligence. The defendant contended that the plaintiff's remedy was to seek rectification of the policy.

Held (dismissing plaintiff's claim with no order as to costs):

(1) The defendant had been providing insurance brokerage services to the plaintiff since 1992 and it was not disputed that there was no written agreement between the parties. As its insurance broker, the defendant had a duty of care to the plaintiff to exercise reasonable care and skill in obtaining insurance in accordance with its principal's instructions. Therefore, the plaintiff's claim must necessarily be adjudicated in the context of the implied term that an insurance broker will exercise reasonable care and skill in the placement of insurance coverage on behalf of the plaintiff. (paras 13 & 17)

(2) It was admitted by the witness for the defendant that the reason why the SWE items were not insured in the 2005 IAR Policy was due to an error made by the defendant, when it failed to correctly prepare the placement slip in accordance with the plaintiff's gross profit calculation. The admission demonstrated that the defendant had acted in breach of its duty of care to the plaintiff to exercise reasonable care and skill in obtaining insurance in accordance with the plaintiff's instructions. (paras 21 & 22)

(3) The evidence showed that at all material times, the plaintiff did not know of the error made by the defendant in the placement slip as the defendant had intimated that there was typographical error in the policy as the premium collected by the insurer covered the SWE items. It was only after the arbitral tribunal had delivered its decision, that the plaintiff became aware of the error in the placement slip and, that the policy had been issued by the insurer in accordance with the placement slip submitted by the defendant. Thus, the point that the plaintiff was not entitled, post arbitration, to make the claim, was unsustainable and must be rejected. (para 24)

(4) The premium paid by the plaintiff covered the SWE items and this was admitted by the defendant. (para 26)

(5) The submission of the defendant to the effect that the plaintiff was estopped from alleging that it was negligent because of the position it had taken at the arbitration, was without basis. It was only after the tribunal had delivered its decision that the plaintiff became aware that the 2005 IAR Policy did not cover the SWE items and the defendant had failed to execute its express instructions as contained in the gross profit calculation sheet. The plaintiff had also never, at any point, either before or during the arbitration, made any representation or agreed to waive its rights to claim against the defendant for negligence. (para 28)

(6) A principal is under no duty to examine if the documents have been drawn up by the insurance broker in accordance with its instruction (*Dickson & Co v. Devitt, foll*). It is the duty of the defendant as an insurance broker, on whose expertise and professionalism the plaintiff relied on, to affect insurance in accordance with the express instructions of its principal. The insurance coverage that the plaintiff needed was within the knowledge of the defendant because of the long standing relationship between the parties. There were no errors in the gross profit calculation sheet forwarded by the plaintiff to the defendant. Hence, the defendant was estopped from contending that the losses could have been avoided if the plaintiff had scrutinised the documents. The omission to secure the correct insurance coverage was the defendant's negligence and he could not foist it on to the plaintiff. (paras 38 & 39)

(7) The remedy of rectification exists to remedy mistakes and was only available to the plaintiff and the insurers. The defendant as an insurance broker was not entitled to institute an action for the rectification of the 2005 IAR Policy. However, the plaintiff, by agreeing with the insurers that the decision of the arbitral tribunal shall be final, binding and non-appealable, had precluded itself from challenging the correctness of the decision. Hence, the plaintiff had lost its right under ss. 37 and 42 of the Arbitration Act 2005 to challenge the award of the arbitral tribunal in refusing the rectification of the IAR 2005 Policy. (paras 41 & 42)

(8) The outcome of the arbitration proceedings had exposed the defendant to liability and it was incumbent on the plaintiff to have appealed against the decision. In the circumstances, the court disagreed with the plaintiff that the defendant should be made liable to the loss suffered by it. The plaintiff would have been entitled to recover the loss from the defendant if the High Court had affirmed the decision of the arbitral tribunal. (para 44)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Dickson & Co v. Devitt [1916] 86 LJKB 315 ***(foll)***

Harvest Trucking Co Ltd v. PB Davis T/A PB Davis Insurance Services [1991] 2 Lloyd's Law Reports 638 ***(foll)***

North West Water Ltd v. Binnie & Partners (a firm) [1990] 3 All ER 547 ***(refd)***

O'Connor v. BDB Kirby & Co [1971] 2 All ER 1415 ***(dist)***

Ramesh Kumar Kapur v. JW Francis [2000] Lloyd's Report IR 361 ***(dist)***

Youell v. Bland Welch & Co Ltd (The 'Superhulls' Cover Case') [1990] 2 Lloyd's Rep 431 ***(foll)***

Legislation referred to:

Arbitration Act 2005, ss. 37, 42

Other source(s) referred to:

Jackson & Powell on Professional Liability, 7th edn, paras 16-113 & 16-114, p 1188

For the plaintiff - Brian Foon (Eolanda Yeo with him); M/s Cheang & Ariff
For the defendant - Romesh Abraham (Lim Qiu Jin with him); M/s Shook Lin & Bok

Reported by S Barathi

JUDGMENT

SM Komathy Suppiah JC:

[1] The plaintiff's claim against the defendant, an insurance broker is based on breach of contract and/or breach of duty in the placement of an insurance policy on its behalf. It is alleged that the placement was incorrect thereby resulting in a loss in the sum of RM9,571,700 with interest and costs. The said sum of RM9,571,700 represented the items disallowed in arbitration

A proceedings brought by the plaintiff against the insurers following an explosion which took place at its plant in 2005 and upon which claims were made on the relevant policy issued by the insurers.

B **The Facts**

[2] There is no serious conflict of evidence in this case. The facts can be shortly stated. The plaintiff owned a hot briquetted iron plant in Labuan. It had purchased through the defendant an industrial all risks insurance policy for the period of 1 January 2005 to 31 December 2005 ("the 2005 IAR Policy") from Progressive Insurance Bhd ("the insurers"). The plaintiff had instructed the defendant to procure insurance coverage, *inter alia* for ten items that were part of its specified working expenses (hereinafter referred to as "the SWE items"). These ten items were catalyst amortisation, nitrogen, plant salary and wages, depreciation – plant, insurance – plant, tug boat rental, yard and jetty rental, reversal of provision for shut down cost, interest expense and plant consultancy/studies.

[3] There was an explosion in the plaintiff's plant on 31 October 2005. Following the explosion, the plant was closed for 166 days. The plaintiff made a claim based on the policy. The insurers denied liability and the parties resorted to arbitration in accordance with the arbitration clause in the 2005 IAR Policy.

[4] In the course of the arbitration proceedings, the defendant discovered that the SWE items were not covered in the 2005 IAR Policy. The defendant duly informed the plaintiff by way of letter dated 25 May 2007 that the premium paid by the plaintiff to the insurer included the cover for the SWE items and, advised the plaintiff that the insurers had made a typographical error in the 2005 IAR Policy.

[5] Whereupon the plaintiff promptly amended its points of claim in the arbitration proceedings and took the position as advised by the defendant. The amendment made reference to the defendant's letter of 25 May 2007 and the plaintiff thus sought rectification of the 2005 IAR Policy, to include the SWE items.

[6] The arbitral tribunal on 18 December 2008, disallowed the plaintiff's claim in relation to the SWE items and also refused its prayer for a rectification of the policy. It was held by the tribunal at para. 137 of the arbitration award as follows:

> All in all, the evidence falls far short of that which is required to support a plea of rectification – a remedy which is rarely granted in the context of a substantial commercial contract.

[7] By letter dated 5 January 2009, the plaintiff informed the defendant of its intention to claim from it RM9,571,700 resulting from the rejection of the SWE items by the arbitral tribunal followed by a formal letter of demand to the defendant on 25 September 2009 and one week later, the institution of this action against the defendant.

Witnesses

[8] The following witnesses gave evidence for plaintiff on 11 November 2013:

(a) Pang Fook Fah (SP-1), the plaintiff's general manager;

(b) Ho Yun Tong (SP-2), senior manager, finance & administration in the plaintiff.

[9] Mr Lim Kok Hui (SD-1), the senior vice president of the defendant gave evidence on its behalf on 12 November 2013.

Case For The Plaintiff

[10] The plaintiff's case is that the defendant had failed to act in accordance with its instructions, in that it failed to place insurance coverage for the SWE items in the 2005 IAR Policy. There was an error in the placement slip submitted by the defendant to the insurers, which resulted in the SWE items being excluded from the policy.

Case For The Defendant

[11] The case for the defendant is that the premium paid by the plaintiff had included coverage for the SWE items. There was a typographical slip in the placement slip and the 2005 IAR Policy in not expressing 0% against the SWE items. The plaintiff's remedy was to seek rectification of the policy. The defendant was not liable for the losses suffered by the plaintiff as there was a break in the chain of causation and the plaintiff was guilty of contributory negligence.

Issues To Be Tried

[12] There are five issues to be tried as agreed by the parties. The issues are:

(a) Whether the defendant was negligent and/or had breached its obligation as the plaintiff's insurance broker;

(b) Whether the defendant has admitted to be negligent in the arbitration proceeding;

(c) Whether the insurance premium to be paid by the plaintiff in connection with the business interruption coverage, was calculated on the basis that the expenditure was and is indeed, covered under the said policy;

(d) Whether the plaintiff is estopped from stating that the defendant is negligent based on the position taken by the plaintiff in the arbitration proceedings *ie,* that the agreement and/or the general intention of all the parties that such expenditure should be covered by insurance coverage, given that it has been listed as 0% on the gross profit calculation submitted by the plaintiff to the defendant; and

(e) Whether any loss, if suffered, by the plaintiff was caused and/or contributed to by the negligence of the plaintiff, if any.

Issue (a): Whether The Defendant Was Negligent

What Is The Duty Of The Defendant

[13] The evidence revealed that the defendant has been providing insurance brokerage services to the plaintiff since 1992. It is not in dispute that there is no written agreement between the plaintiff and the defendant. The plaintiff alleged that the defendant had been negligent in the placement of the 2005 IAR Policy.

[14] In order to answer the question of whether the defendant had been guilty of negligence, one must first consider what is the duty towards the plaintiff that it is alleged the defendant has broken. The concept of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody.

[15] There appears to be no local authorities that have considered the duties of an insurance broker. I was referred to numerous English decisions on the subject. In *Youell v. Bland Welch & Co Ltd (The 'Superhulls' Cover Case')* [1990] 2 Lloyd's Rep 431, it was held (at p. 445):

> An insurance broker's duties include the following: (i) He must ascertain his client's needs by instruction or otherwise. (ii) He must take reasonable skill and care to procure the cover which his client has asked for, either expressly or by necessary implication. (iii) If he cannot obtain what is required, he must report in what respects he has failed and seek his client's alternative instructions.

[16] In *Harvest Trucking Co Ltd v. PB Davis T/A PB Davis Insurance Services* [1991] 2 Lloyd's Law Reports 638, it was held (at 643):

> A broker or an insurance intermediary is employed to act as a middle man between the person employing him – normally the person requiring insurance – on the one hand, and the proposed insurer or insurers on the other. The broker or other intermediary is normally the agent of the assured. This arises because he is normally employed by the client to obtain insurance ...
>
> The ordinary function of the insurance broker or other intermediary is to receive instructions from his principal as to the nature of the risk or risks and the rate or rates of premium at which he wishes to insure, to communicate the material facts to the potential insurers and to obtain insurance for his principal in accordance with his principals' instructions and on the best terms available. The liability of an insurance agent to his employer for negligence is comparable to that of any agent. He is bound to exercise reasonable care in the duties which he has undertaken ...

[17] These authorities are of persuasive value and I agree with the view expressed in these two English cases on the duty of an insurance broker. The defendant thus had a duty of care to the plaintiff as its insurance broker to exercise reasonable care and skill in obtaining insurance in accordance with its principal's instructions. In the circumstance, the defendant submitted, and I agree that the plaintiff's claim must necessarily be adjudicated, in the context of the implied term that an insurance broker will exercise reasonable care and skill in the placement of insurance coverage on behalf of the plaintiff.

A The Practice In The Placement Of IAR Policies

[18] In order to determine, whether the defendant has breached its duty to the plaintiff, it is necessary to examine the practice between the parties in the placement of the policies. The
B unchallenged evidence of the plaintiff's witnesses disclosed the practice between parties in respect of placement of insurance policies to be as follows:

(a) the plaintiff would prepare the gross profit calculation sheet for the defendant, indicating the items it wanted to insure and
C what it did not want to insure or did not want to insure in full;

(b) upon receipt of the same the defendant would prepare the placement slip for the insurers;

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(c) having placed the insurance coverage, the defendant would prepare a debit note for the plaintiff to make the premium payment and an insurance summary which set out the details and manner of the cover sought to be placed;

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(d) after the plaintiff pays the premium, the insurer would issue the policy which would be forwarded to the defendant who in turn would then forward the policy to the plaintiff. The defendant had forwarded 2005 IAR Policy to the plaintiff sometime in March 2005; and

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(e) The above was also the procedure adopted in respect of the placement of the policy for year 2005 IAR Policy.

[19] It is common ground that there was no error in the
G placement of the 2003 IAR policy. It was consistent with the gross profit calculation sheet submitted by the plaintiff to the defendant where a 0% was written against the SWE items. A 0% against an item in the gross profit calculation sheet indicated that the defendant was to insure the relevant item 100%. It is also
H common ground that the gross profit calculation sheet prepared by the plaintiff for years 2004 and 2005 IAR Policy had also clearly indicated that the SWE items were to be insured and it had designated a 0% against those items. However, the placement slips, insurance summaries and the policies issued for 2004 and
I 2005 did not place any percentage against those items.

Whether The Defendant Had Breached Its Duty

[20] The issue in the present case is whether the defendant was in breach of its duties when the SWE items in the IAR policy of 2005 did not specify against each item a "0%", as had been indicated in the gross profit calculation prepared by the plaintiff.

[21] The evidence of the defendant's senior vice president on this aspect of the case is crucial. He candidly accepted that the reason why the SWE items were not insured in the 2005 IAR Policy was due to an error made by the defendant, when it failed to correctly prepare the placement slip in accordance with the plaintiff's gross profit calculation. He agreed that the defendant's officer had omitted to indicate '0%' or omit the reference to the disputed SWE items in the placement slip (to avoid any potential uncertainty as to coverage). He described the error in the placement slip as a 'typographical error'.

[22] The admission of the senior vice president of the defendant demonstrated that the defendant had acted in breach of its duty of care to the plaintiff to exercise reasonable care and skill in obtaining insurance in accordance with the plaintiff's instructions. The 2005 IAR Policy had been issued based on the error committed by the defendant in the placement slip that was forwarded to the insurer. It was this error that resulted in the insurers issuing the 2005 IAR Policy in the manner it did. The policy did not cover the SWE items. Brokers owe a duty to ensure that the information given by the client is relayed to the insurer correctly and arrange for insurance that represented the protection the client desired. This is a fundamental duty and the defendant was in breach of its obligations to obtain insurance in accordance with the instructions of the plaintiff as contained in the gross profit calculation sheet.

[23] I will briefly touch on two points made on behalf of the defendant on this issue. First, it was submitted by the defendant that because of the placement slip that was sent to the insurer in respect of the 2005 policy had been prepared in the same way as the one submitted in 2004, the plaintiff was precluded from asserting that there was an error in it. It is clear from the unchallenged evidence of the plaintiff's witnesses that the plaintiff was not aware of the error made by the defendant in the 2004 and 2005 policy until after the explosion in its plant. The defendant had been its broker since 1992 and the SWE items

have always being insured. The placement slip that was forwarded to the insurers was not sent to the plaintiff for its approval. And, most crucially, there is the admission of the defendant's senior vice president that he was not in a position to explain why the officer who had prepared the placement slip in respect of the 2005 IAR Policy had departed from the usual method used in the preparation of placement slips. The point is thus devoid of any merit.

[24] The next point made by the defendant was based on the conduct of the plaintiff in not making any claim (or even asserting a claim) against the defendant of any alleged breach of duty, prior to the delivery of the arbitration award in December 2008. It was said that the conduct of the plaintiff was consistent with and demonstrated the defendant's contention that there was no "breach of duty" in relation to the placement of the 2005 IAR Policy. It was argued that the plaintiff was consequently not entitled, post arbitration, to make this claim against it. Again, I find no merit in the point taken. The evidence shows that at all material times, the plaintiff did not know of the error made by the defendant in the placement slip as the defendant had intimated that there was a typographical error in the policy as the premium collected by the insurer covered the SWE items. It was only after the arbitral tribunal had delivered its decision, that the plaintiff became aware of the error in the placement slip and, that the policy had been issued by the insurer in accordance with the placement slip submitted by the defendant. This point is unsustainable and must therefore be rejected.

Issue (b): Whether The Defendant Had Admitted Being Negligent In The Arbitration Proceedings

[25] In view of my conclusion that the defendant was in breach of its duty of care to the plaintiff, it is not necessary to decide on this issue.

Issue (c): Whether The Premium Paid By Plaintiff Covered The SWE Items

[26] The undisputed evidence is that the premium paid by the plaintiff covered the SWE items. In any event, the defendant admitted that the premium which it collected on behalf of the insurers from the plaintiff, covered the disputed SWE items.

Issue (d): Whether The Plaintiff Is Estopped From Stating That The Defendant Was Negligent Based On The Position Taken In Arbitration Proceedings

[27] The defendant contended that the plaintiff's conduct at the arbitration proceedings in adopting the stand taken by the defendant, as set out in the defendant's letter of 25 May 2007 that there was a typographical slip in the 2005 IAR Policy, had adopted and ratified the defendant's position on the matter. The plaintiff is consequently estopped from taking an inconsistent position on this issue in the present proceedings. He cited two decisions in support of this proposition. They were *North West Water Ltd v. Binnie & Partners (a firm)* [1990] 3 All ER 547 and *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189. The principle enunciated in these two cases deals with *res judicata* which bars the reopening of the same issue in subsequent proceedings. The estoppel also applies to points which were not raised but could have been raised with reasonable diligence and should in all the circumstances have been raised.

[28] The plaintiff contended and I agree, that the submission of the defendant to the effect that the plaintiff is estopped from alleging that it was negligent because of the position it had taken at the arbitration, is without basis. It is imperative to note that it was only after the tribunal had delivered its decision, that the plaintiff become aware that the 2005 IAR Policy did not cover the SWE items and the defendant had failed to execute its express instructions as contained in the gross profit calculation sheet. More fundamentally, as correctly pointed out by the plaintiff, it had never at any point, either before or during the arbitration made any representation, or agreed to waive its rights to claim against the defendant for negligence. It is true that at the arbitration hearing, the defendant had adduced evidence in support of the plaintiff's case, but this assistance, cannot by any stretch, amount to an estoppel. I accept the plaintiff's submission that in the absence of evidence to show that there was this representation and reliance on it, the argument on estoppel must fail.

[29] In the result, I find that the plaintiff is not barred by the doctrine of estoppel from bringing this action against the defendant merely because of the position taken at the arbitration.

Issue (e): Contributory Negligence

[30] The defendant contended that if, contrary to its submission, it is found to have been in breach of its duty to the plaintiff, it was, however, not its breach of duty that caused or contributed to the loss of the sum now claimed. The defendant contended that the plaintiff had by its own actions caused or substantially contributed to its own loss.

[31] The following passage in *Jackson and Powell on Professional Liability,* 7th edn. at paras. 16-113 and 16-114 at p. 1188 on the issue of liability of an insurer broker is useful:

> An award of damages is the principal remedy which the court will grant for breach of duty by an insurance broker. Since an insurance broker is not normally remunerated by his client, no question of forfeiture or repayment of fees generally arises.
>
> The assessment of damages is subject, in every case, to the overriding principle that the damage in respect of which compensation is sought must be sufficiently proximate to the insurance broker's breach of duty. Broadly speaking, this means that (a) the breach of duty must have "caused" the damage, and (b) the damage in question was foreseeable.

Failure To Check Relevant Documents

[32] The defendant contended that the losses suffered by the plaintiff could have been avoided if it had checked the relevant documents sent to it in regard to the 2005 IAR Policy. In particular the defendant referred to the following evidence:

> (i) Upon the placement being made with the insurers, the defendant, by letter dated 7.1.2005 to the plaintiff, enclosed the relevant debit note issued by the insurers (setting out the premium payable) and insurance summary, which specifically set out the details and manner of the cover sought to be placed and, in particular, the manner the SWE expenses were expressed i.e. by not specifying any percentage against the items concerned;
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> (ii) The defendant's letter of 7 January 2005 to the plaintiff also expressly stated as follows:
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> > SP2: Please ensure that the particulars stated in the abovementioned document are in accordance with your requirements respectively. If there is any discrepancy(s) /amendment(s) to be made, please advise us as soon as possible.

(iii) No response was received from the plaintiff as to any changes or amendments as to the manner of the coverage. Instead, the plaintiff proceeded to issue a cheque for the premium sum stated, which was then forwarded to the insurers, who, in turn, issued the relevant policies;

(iv) The said policy was then forwarded to the plaintiff, by letter dated 2 March 2005, which again specifically stated as follows:

> SP2: Please ensure that the particulars stated in the abovementioned document are in accordance with your requirements respectively. If there is any discrepancy(s) /amendment(s) to be made, please advise us as soon as possible.
>
> The policy issued, specifically set out the SWE expenses and against items 20 – 29 thereof, did not express any percentage against the same.

(vi) The policy also set out the following notice on its first page:

> SP2: Please read this policy carefully and inform us immediately if any error is found.

(vii) No response was received by the defendant as to any alleged discrepancy in the policy issued.

[33] The defendant contended that the reason the documents sent to the plaintiff required the latter to read it thoroughly and notify it of errors was because the details and information relating to such items were within the exclusive knowledge of the plaintiff and not the defendant. It was the plaintiff's obligation to check the documents to ensure that the insurance policy conformed and had been purchased in accordance with its instructions. It was stressed that the errors in the 2005 IAR Policy could have been detected earlier, if only the plaintiffs had been diligent, checked the documents and reverted to the defendant with the omissions. By its conduct, the plaintiff had represented that the policy conformed to its instructions. The defendant argued strenuously that the failure of the plaintiff to check the documents disentitled it from recovering damages from it.

[34] The defendant referred, in this connection, to the case of *O'Connor v. BDB Kirby & Co* [1971] 2 All ER 1415. In that case, the Court of Appeal held that an insured's failure to check a proposal form was the sole cause of his loss and dismissed the claim. Karminski LJ stated (at p. 1421):

> What follows seems to be the vital matter here. The broker told the insured to read through the proposal form and then check that everything was accurate. The proposal form of course contained a large number of answers dealing with other questions. The insured apparently read it through and signed it. The form itself stresses the importance of correct answers to the questions asked in relation to the policy of insurance. I myself have come to the conclusion, quite apart from the other matters which Davies LJ has dealt with, that this is a case where the fifth and last matter in the notice of appeal must be right;
>
> namely that the sole effective cause of the loss here was the insured's failure to check the entire contents of the proposal form, failing in consequence to notice the error with regard to the garage facilities.

[35] In the same case, Megaw LJ expressed the same view and held (at p. 1423):

> Well, if matters ended there, with great respect to the judge, I should have thought the decision could only be in favour of the brokers. What the judge does say is that the broker is acquitted of dishonesty, and, so far as the mistake is concerned, it may have been because he had difficulty in understanding the insured's accent. That, says the judge, is a possibility. How, on the basis of a possibility such as a misunderstanding which might have been the fault of one or of the other or of neither, could it be held to have been shown that the broker was in breach of his duty? I do not think it could be so held, especially when one adds the admitted fact that it was within the broker's contemplation that he was going to ask the insured himself to check the answers, no doubt partly because of the very possibility that some misunderstanding might occur.

[36] The defendant also relied on the case of *Ramesh Kumar Kapur v. JW Francis* [2000] Lloyd's Report IR 361. In that case, the insured's claim against the broker failed in that the insured had noticed a particular omission in the proposal form but did not act on the same. It was held, by the Court of Appeal, that this was the sole effective cause of the loss notwithstanding the broker's own negligence. It was held (at p. 368);

> I have come to the conclusion that this court ought to find that Mr. Kapur was aware of the omission, but did not raise the point with Mr. Hinkson. He was well aware of the importance of the disclosure of claims within three years. By 17 October he must have realized that the April 1993 claim was well within the three year period. For these reasons I would allow the appeal and enter judgment for the first defendant.

[37] The plaintiff challenged the allegation that such a duty existed. In support of this proposition, it relied on the decision in *Dickson v. Devitt* [1916] 86 LJKB 315 ([1915-1916] Vol XXXII The Times Law Report 547). In that case, it was held:

> It has, however, been contended on behalf of the defendant that, even though there has been a want of care and skill on his part, yet the plaintiffs' loss was not due to that, but was due to the plaintiff's own negligence in that, if they had looked at the documents, they would have seen at once that the goods were not covered by the policy, and they would then have been able to effect an insurance on the goods. It appears to me, however, that the question is whether or not the loss which the plaintiffs have sustained is a reasonable and natural consequence of the defendant's breach of contract. In my opinion, when a broker is employed to effect an insurance, especially when the broker is a person of repute and experience, the client is entitled to rely upon the broker carrying out his instructions, and is not bound to examine the document drawn up in performance of those instructions have, in fact, been carried out by the broker. In many cases the principal would not understand the matter, and would not know whether the document did in fact carry out his instructions.
>
> *Business could not be carried on if, when a person had been employed to use care and skill with regard to a matter, the employer is bound to use his own care and skill to see whether the person employed has done what he was employed to do. I think the principal is entitled to rely upon the reputation of the person whom he employs*. In the present case, therefore, I think the plaintiffs were entitled to rely and did rely upon their instructions having been carried out by the defendant, and that it was the natural consequence of the defendant's breach of contract that the plaintiffs put these goods on the Yasaka Maru, assuming that the policy of insurance against war risk which had been tendered to them was in accordance with their instructions.
> (emphasis added)

[38] I entirely agree with the reasoning in *Dickson v. Devitt (supra)*. In my view, it states the correct proposition of law that a principal is under no duty to examine if the documents have been drawn up by the insurance broker in accordance with its instructions. It is the duty of the defendant as an insurance broker on whose expertise and professionalism the plaintiff's relied on, to effect an insurance in accordance with the express instructions of its principal. He is not a mere post box. The defendant has been

A the plaintiff's insurance broker since 1992. The insurance coverage that the plaintiff needed was within the knowledge of the defendant because of the long standing relationship between the parties. All that was required by the defendant from the plaintiff was the amount to be insured as provided in the gross profit
B calculation.

[39] The cases cited and relied on by the defendant have no application to the present case as the information given by the insured to the broker in those cases was incorrect. This is not the
C case here. There were no errors in the gross profit calculation sheet forwarded by the plaintiff to the defendant. In my view, the plaintiff was entitled to rely on the skill and reputation of the defendant to place the insurance coverage according to its express instruction. Applying the principal enunciated in *Dickson v. Devitt*
D *(supra)*, the defendant is estopped from contending that the losses could have been avoided if the plaintiff had scrutinised the documents. The omission to secure the correct insurance coverage is the defendant's negligence and he cannot foist it on to the plaintiff.

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[40] The evidence entirely fails to prove that there was a duty on the plaintiff to read and check the documents showing what insurance had been effected. I therefore reject the submission the loss suffered by the plaintiff was due to its failure to check the
F documents sent to it.

The Plaintiff's Position In The Arbitration Proceedings

[41] The next point taken by the defendant was that it was not liable for the losses suffered by the plaintiff based on the decision
G of the plaintiff to agree with the insurers, at the commencement of the arbitration proceedings, that the decision of the arbitral tribunal shall be final, binding and non-appealable. It is argued that the plaintiff has only itself to blame for its present predicament. It had lacked reasonable foresight in agreeing with the insurers to
H accept that the decision of the arbitrator shall be final and unappealable. By virtue of this agreement, it has now lost its right under ss. 37 and 42 of the Arbitration Act 2005 to challenge the award of the arbitral tribunal in refusing rectification of the IAR 2005 Policy. The defendant argued the plaintiff has suffered the
I losses claimed in this action, because of the aforesaid agreement and not because of its breach of its duty to the plaintiff.

[42] There is, undoubtedly, considerable force in this argument. It is true that the plaintiff by agreeing to accept that the decision of the arbitral tribunal as final and non-appealable, has precluded itself from challenging the correctness of the said decision in regard to the plaintiff's right to apply for rectification. In the light of this fact, it would be unjust and inequitable for the plaintiff the loss from the defendant particularly when there is evidence that the premium collected by the insurers covered the SWE items. The defendant as an insurance broker, is not entitled to institute an action for rectification of the 2005 IAR Policy. This is a remedy which is only available to the plaintiff and the insurers. The remedy of rectification exists to remedy mistakes. It is reasonably probable that the High Court could have taken a contrary view, and decided the issue in favour of the plaintiff, if the plaintiff had not forfeited its right to challenge the decision of the tribunal. In that event, this action against the defendant, may not have been necessary.

[43] In this context, the following passage at para. 16-066 in *Jackson and Powell (supra)* merits reproduction in full here:

> If the position adopted by the insurer is absurd or spurious, then the broker will not be liable. The broker's duty does not extend to protecting the client against the risk that the insurer will refuse to meet its claim on absurd or spurious grounds. If the insurer does adopt an absurd position, then the client should challenge the insurer's rejection of his claim rather than sue his broker. If he fails to do so and simply pursues a claim against his broker, then his failure to challenge the insurer's position will be found to be the cause of his loss, so the claim will fail as a matter of causation.

[44] It is true that in this case, the plaintiff did bring an action against the insurers by way of arbitration proceedings to challenge the rejection of its claim. But, because the outcome of the arbitration proceedings had exposed the defendant to liability, it was incumbent on the plaintiff to have appealed against the decision in the face of compelling evidence that the premium charged and collected by the defendant on behalf of the insurers included the disputed SWE items. In the circumstance, I am unable to agree with the plaintiff, that the defendant should be made liable for the loss suffered by it. The plaintiff has only itself to blame for the dilemma that it is in because of the unfortunate agreement with the insurers. The plaintiff would have been entitled

A to recover this loss from the defendant, if the High Court had affirmed the decision of the arbitral tribunal. In that case, it would not be open to the defendant to contend that the plaintiff had not acted reasonably in challenging the decision of the tribunal.

B **Conclusion**

[45] For the reasons stated, I dismiss the plaintiff's claim with no order as to costs. I am mindful that costs should follow the event, but in my view, the circumstances in this case, did not warrant it. The principal reason the plaintiff is entangled in this C litigation is because of the error made by the defendant in procuring the insurance for it.

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